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## Immigration and Naturalization

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# Immigration and Naturalization

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## I. Introduction

The Immigration and Naturalization Committee's contribution to the 2016 *Year in Review* provides critical updates on key issues in immigration law in the United States, Puerto Rico, India, and the European Union. It would be remiss, however, to ignore the potential changes surrounding U.S. immigration law and policy in the aftermath of the presidential election. If rhetoric translates into action, immigrants and practitioners in this field will likely face significant changes. Refugee admissions, particularly those with Syrian beneficiaries, may decline precipitously. Immigration registration databases—first created under the George W. Bush Administration but dormant under the Obama Administration—may return. Protections for immigrant children provided by the Deferred Action for Childhood Arrivals program may dissipate. Normalization of relations with Cuba, which has led to a surge in immigrants from Cuba, may reverse course.<sup>1</sup> Individually, each change would dramatically affect a particular target group, such as child immigrants, Cubans, or Syrian refugees. Taken together, these proposals suggest a broad shift in public policy toward protectionism and nationalism, contrary to America's historical commitment to promoting diversity and providing refuge. Time will tell if the administration acts upon its campaign rhetoric.

## II. “Crimmigration” Update: *Mathis v. United States*<sup>2</sup>

The United States Supreme Court has made significant changes to “crimmigration” case law, defined as cases analyzing the immigration consequences of criminal convictions. The shifts occurred because the analyses employed in this area of the law—known as the categorical and modified categorical approaches—are derived from federal criminal sentencing law. When the Court interpreted the categorical approach in the

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\*\* Authors of each section are noted accordingly.

1. See Kevin J. Fandl, *Cuban Migration to the United States in a Post-Normalized Relations World*, 26 MINN. J. INT'L L. (forthcoming 2017); see also, Kevin J. Fandl, *Adios Embargo: The Case for Executive Termination of the U.S. Embargo on Cuba*, AM. BUS. L. J. (forthcoming 2017).

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sentencing context, it had a direct impact on the parallel crimmigration analysis. Most recently, the Supreme Court again redrew the crimmigration map in its decision in *Mathis v. United States*.<sup>3</sup>

To understand the impact of the decision in *Mathis*, an understanding of the historical development of the categorical and modified categorical approaches is necessary. The Supreme Court introduced the categorical approach in *Taylor v. United States*,<sup>4</sup> a case addressing the sentencing implications of a prior conviction for burglary in Missouri. The Court determined whether the Missouri conviction met the federal generic definition of burglary. The Court took this step to ensure that, when the statutes criminalize the same conduct, convictions for this crime in one state are treated identically, for sentencing purposes, to convictions for burglary in another state.<sup>5</sup> In conducting this analysis, the court focused solely on the elements of the state statute.<sup>6</sup> If all the conduct criminalized by the state statute fell within the generic federal definition, the state statute is a categorical match to the federal generic definition.

This categorical analysis functions the same in the immigration context as in the criminal sentencing context. The controversy surrounded which sentencing enhancements (or immigration consequences) arise if only *some* of the conduct criminalized by the state statute falls within the generic federal definition. Under these circumstances, a court may consult the charging paper or jury instructions to determine if a jury was required to find all of the elements of the generic offense.<sup>7</sup> This additional analysis is known as the modified categorical approach. In 2013, the Supreme Court explained that the modified categorical approach is *only* applicable to “divisible” statutes, so named because the alternative elements of the statute (some matching the generic definition of the offense and some not) “divide” the statute into multiple, discrete crimes.<sup>8</sup>

In *Mathis*, the Court had to determine what qualifies as a divisible statute, and accordingly, when to apply the modified categorical approach.<sup>9</sup> Previously, courts defined a divisible statute as one containing alternative elements, some of which matched the generic definition of the offense that would lead to an immigration consequence.<sup>10</sup> The issue remained open as to whether the presence of the word “or” between two alternatives necessarily makes them alternative elements. The Court granted certiorari in *Mathis* to resolve a Circuit Court split concerning whether a jury must unanimously agree on an alternative enumerated in the statute in order for it to qualify as an element. The Court recognized that disjunctively phrased statutes might

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3. *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016).

4. 495 U.S. 575 (1990).

5. *Id.* at 592.

6. *Id.* at 601.

7. *Id.*

8. *Descamps v. United States*, 133 S. Ct. 2276 (2013).

9. *Mathis v. United States*, 136 S. Ct. 2243 (2016).

10. *Descamps*, 133 S. Ct. at 2276.

enumerate alternative elements or might enumerate “various factual means of committing a single element.”<sup>11</sup> The Court then suggested several ways that a lower court should ascertain whether an alternative is an element or merely a means of committing an element. First, a court should review state case law interpreting the statute at issue. If a jury need not agree on which alternative was violated, then the alternative is a factual mean, not an element of the offense.<sup>12</sup> Second, a court should look at the punishment accorded to the alternatives. If one alternative carries a different punishment than the other, it is an element of the offense.<sup>13</sup> Third, the statute may also “identify which things must be charged (and so are elements) and which need not be (and so are means).”<sup>14</sup> Finally, if the statute and state law interpretations do not resolve the issue conclusively, a court may also “peek” at the record of conviction for the sole purpose of determining whether alternatives are elements or means.<sup>15</sup> For example, if the alternatives are charged disjunctively in the charging document, that is “as clear an indication as any that each alternative is only a possible means of commission, not an element that the prosecutor must prove to a jury beyond a reasonable doubt.”<sup>16</sup> Jury instructions that list all of the potential alternatives are also indicative of alternative means, not alternative elements.<sup>17</sup>

The Attorney General and the Board of Immigration Appeals (“Board”) have conceded that the decision in *Mathis* applies to administrative immigration proceedings.<sup>18</sup> Therefore, immigration practitioners need to consult state case law interpretations of statutes, jury instructions, and any other resource that will help them identify whether the word “or” in a statute truly separates alternative elements (*i.e.*, things a jury must unanimously agree upon to convict). If so, the presence of “or” triggers the use of the modified categorical approach to analyze the immigration consequences of a conviction. It is important to note that the Board has identified at least one issue regarding the implementation of the categorical approach, which remains the subject of the Circuit Court split, and as such, the Board will apply the law of the Circuit in which each case arises.<sup>19</sup> Thus, practitioners are advised to continue to follow the developments in crimmigration law in their Circuit, as this area of the law is constantly

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11. *Mathis*, 136 S. Ct. at 2249.

12. *Id.* at 2256.

13. *Id.*

14. *Id.*

15. *Mathis v. United States*, 136 S. Ct. 2243, 2256-57 (2016).

16. *Id.* at 2257.

17. *Id.*

18. *Matter of Chairez-Castrejon & Sama*, 26 I&N Dec. 796 (AG 2016) (lifting the stay on cases involving the question of what constitutes a divisible statute in light of the decision in *Mathis*); *Matter of Silva-Trevino*, 26 I&N Dec. 826 (BIA 2016).

19. *Silva-Trevino*, 26 I&N Dec. at 831 (acknowledging a circuit split on the use of the “realistic probability” test in the categorical approach).

changing. Indeed, the Supreme Court has granted certiorari in another crimmigration case for the upcoming term.<sup>20</sup>

### III. Indian Immigration Updates 2016<sup>21</sup>

The Government of India continues to increase its vigilance on immigration matters by either introducing new measures, modernizing systems, or strengthening enforcement. Some of the recent measures affecting foreign nationals working, living, or investing in India are set out below.

#### A. OPERATING ENTITY AT THE HYDERABAD FRRO - REQUIRED FOR EMPLOYMENT VISA SPONSORSHIP

As of September 2016, the Foreigners Regional Registration Office (“FRRO”) at Hyderabad requires evidence of a visa sponsor’s business operations in Hyderabad. Companies must provide evidence that the business is a registered entity when it wishes to sponsor a foreign national on an employment visa in India. This evidence may be a registration certificate issued by the Registrar of Companies, which reflects the registered address of the sponsoring entity. Problems may occur, however, when the registered address of the sponsoring entity is a location other than Hyderabad. When the visa sponsor will employ the foreign national in Hyderabad, the company must provide additional government-issued evidence that it is an operating entity in that jurisdiction. Such proof may include “registration under the Shops and Establishment Act of Telangana State (which is a mandatory requirement for most entities) or any other relevant Telangana State Government body.”<sup>22</sup> This evidence will be required at the time of registration with the FRRO or when extending the employment visa.<sup>23</sup>

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20. *Lynch v. Dimaya*, 2016 WL 3232911 (U.S. Sept. 29, 2016) (addressing whether the definition of a crime of violence under 18 U.S.C. § 16(b) is unconstitutionally vague).

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22. *Australia, Canada, China, Czech Republic, EU, India, Italy, Switzerland, Turkey*, PEARL LAW GROUP, <https://www.immigrationlaw.com/oct-18-2016/> (last visited Apr. 12, 2017).

23. Poorvi Chothani, *India: Operating Entity at the Hyderabad FRRO – Required for Employment Visa Sponsorship*, MONDAQ (Oct. 24, 2016), <http://www.mondaq.com/india/x/537958/work+visas/Operating+Entity+At+The+Hyderabad+FRRO+Required+For+Employment+Visa+Sponsorship>.

## B. LANDLORDS IN INDIA MUST REPORT THE STAY OF FOREIGN NATIONALS ON THEIR PREMISES

The government is increasingly enforcing a long-standing regulation that tracks the stay of foreign nationals in India. The regulations state that: “Any Hotel/ Guest House/ *Dharmashala* (charitable housing)/ Individual House/ University/ Hospital/ Institute/ Others etc. who provide accommodation to [foreign nationals] must submit the details of the residing [foreign national] in Form C to the Registration authorities within 24 hours of the arrival of the [foreign national] at their premises.”<sup>24</sup> Until recently, only hotels, guest houses, hospitals, and hostels were routinely filing Form C for foreign nationals living on their premises. However, now even individual or private home owners (including landlords) are required to file Form C for each foreign national living on their premises.

Form C is designed for collecting prerequisite information on any foreign national who is residing in a: hotel, guest house, *Dharmashala* (charitable house), individual house, university, hospital, institute, or other abode. This information is mandatory from a security point of view. One copy of this Form C must be submitted at the FRRO within 24 hours of the foreign national’s arrival in India. Filing this form helps in proving legal arrival of the foreign national in India.

## C. INDIA’S E-TOURIST VISA AND VISA ON ARRIVAL TO UNDERGO CHANGE

In 2015, to encourage tourism and business travel to India, the government introduced a “[t]ourist visa on arrival (TVoA) scheme”<sup>25</sup> as an “e-tourist visa” (eTV) scheme.<sup>26</sup> This is a misnomer, as it can be used for several reasons, including short business travel, for visits with family, and religious pilgrimages.<sup>27</sup> Applicants must apply for an eTV online a minimum of four days prior to the date of travel. A TVoA-ETA can be obtained at the port of entry into India. Both visas are valid for thirty days from the date of entry into India.

24. *Form C*, INDIA: BUREAU OF IMMIGR., <http://boi.gov.in/content/form-c> (last visited Mar. 29, 2017).

25. “*TOURIST VISA ON ARRIVAL*” SCHEME, MINISTRY OF HOME AFFAIRS GOVERNMENT OF INDIA, <http://mha1.nic.in/pdfs/ForeigD-TourVISA-Schm.pdf> (last visited Apr. 11, 2017); *Tourist Visa On Arrival Scheme*, INDIA.GOV, <https://india.gov.in/spotlight/encouraging-inbound-tourism-tourist-visa-arrival-tvoa-scheme> (last visited Apr. 11, 2017).

26. *e-Tourist Visa Scheme - Fly to India trouble-free*, NATIONAL PORTAL OF INDIA, <https://india.gov.in/spotlight/e-tourist-visa-scheme-fly-india-trouble-free#tab=tab-1> (last visited Mar. 29, 2017).

27. *Id.*

### 1. *Mandatory Bio-metric Collection for Seven Indian Visa Categories When Applying in London*

In a Press Release dated August 5, 2016, the High Commission of India in London announced the use of biometrics enrollment for visa applicants in certain visa categories, with biometric collection in effect as of August 19, 2016.<sup>28</sup> Individuals applying for certain visas at the Indian Visa Application Centers in the United Kingdom will now be required to appear in person and submit biometrics (fingerprint data and facial photographs). But applicants under the age of twelve or over the age of seventy are exempt from the new biometric enrollment requirement.<sup>29</sup> Mandatory biometric collection applies to employment visas, journalist visas, research visas.

### D. TOURIST VISA FOR YOGA AFICIONADOS AND INDIAN MEDICINE SYSTEMS ENTHUSIASTS

Foreigners interested in learning to practice yoga or study Indian medicine in India will need to apply for an E-Tourist visa. With an eye to making Indian yoga and its age-old medicine system accessible to all nationals, the Government of India has decided to add “attending a short-term yoga programme” to its existing list of permissible activities under Tourist and E-Tourist visa categories.<sup>30</sup> The Government has also included “short duration medical treatment under Indian systems of medicine,” thus expanding the list of permissible activities for foreigners on an E-Tourist visa.<sup>31</sup>

### E. MANDATORY REPATRIATION PROCESS

For many years, the Indian government has required foreign nationals to register with the FRRO/FRO when they will work in India for an extended period. The entity that sponsors the visa must give an undertaking to the FRRO/FRO on behalf of the foreign national, “to ensure good conduct of the [foreign national] during his/her stay in India.”<sup>32</sup> An “undertaking” is a guarantee given in writing by the visa sponsor to take on the responsibility for the actions of the foreign national during his or her stay in India.

Until recently, the government did not require formal notification regarding repatriation to de-register the foreign national employees when

28. Press Release, High Commission of India: London, Introduction of Mandatory Biometric Enrolment for Seven Visa Categories With Effect From August 19, 2016, (Aug. 5, 2016), available at <http://www.vfsglobal.com/india/uk/pdf/Introduction-of-Mandatory-Biometric-Enrolment.pdf>

29. *Id.*

30. *Activities permitted under Tourist Visa and e-Tourist Visa*, MINISTRY OF HOME AFFAIRS GOVERNMENT OF INDIA (June 2, 2016), available at [http://mha1.nic.in/pdfs/MaterialTV\\_02062016\\_01.pdf](http://mha1.nic.in/pdfs/MaterialTV_02062016_01.pdf).

31. *Id.*

32. *Regulations applicable to foreigners in India*, INDIA: BUREAU OF IMMIGR., available at <http://boi.gov.in/sites/default/files/Regulations.pdf> (last visited Apr. 10, 2017).

they ended their employment or left the country permanently. The procedure has changed. The Ministry of Home Affairs published a notification making it mandatory for employers to report the termination or departure of all foreign nationals working with them in India.<sup>33</sup>

#### F. GRANT OF CITIZENSHIP MADE EASIER FOR CERTAIN PAKISTAN NATIONALS

In an effort to allow certain minorities from Pakistan to continue to live and work in India, the Modi-led government put forth a proposal to simplify the process for obtaining Indian citizenship for such individuals. Under the proposal, certain Pakistani nationals staying in India on a Long-Term Visa will be permitted to: open bank accounts with prior RBI approval, subject to certain conditions, to buy property; obtain a Permanent Account Number (PAN) and Aadhaar Number (a twelve-digit unique identification number issued by the Indian government to the residents of India); and become self-employed.<sup>34</sup>

#### G. PIO CONVERSION TO OCI EXTENDED UNTIL JUNE, 2017

The deadline for the conversion of the Person of Indian Origin (POI) card to an Overseas Citizen of India (OCI) card has been extended until June 30, 2017.<sup>35</sup>

### IV. Island Life Might Serve as the Best Entry of Foreign Investment to the United States: Puerto Rico as Tax Haven for Attracting Foreign Investment to the United States<sup>36</sup>

United States immigration laws take into consideration the country's need for job creation and influx of foreign capital to further economic growth. The laws establish requirements for investors to ensure the creation of jobs for U.S. residents. Of course, some states, territories, and cities might need that job creation or capital influx more than others. To account for this, most immigrant visas incentivize the creation of jobs in rural areas and places in need of economic development.

Puerto Rico is a U.S. commonwealth that qualifies as part of the United States for investment visa purposes. But it is considered a "foreign country" for U.S. federal income tax purposes.<sup>37</sup> At the same time, due to its political,

33. *Id.*

34. *Grant of various facilities to persons belonging to minority communities in Afghanistan, Bangladesh and Pakistan, namely, Hindus, Sikhs, Buddhists, Jains, Parsis and Christians, staying in India on Long Term Visa (LTV)*, MINISTRY OF HOME AFFAIRS GOVERNMENT OF INDIA (Aug. 19, 2016), available at [http://mha1.nic.in/pdfs/LTVFacilities\\_230816.pdf](http://mha1.nic.in/pdfs/LTVFacilities_230816.pdf).

35. *Person of Indian Origin (PIO) Card*, EMBASSY OF INDIA, <https://indianembassy.org/pages.php?id=21> (last visited Apr. 10, 2017).

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37. 26 U.S. Code § 933 (2017).

geographic, and economic climate, nearly the entire island qualifies as a “targeted employment area.” The island’s current fiscal crisis, which has led to significant unemployment, has made it even more attractive in this regard. The crisis has increased the need for significant capital investment, thereby making Puerto Rico the perfect entry point for foreign investors interested in doing business in the United States and obtaining the immigration benefits such investment provides.

#### A. PUERTO RICO’S UNIQUE TAX INCENTIVES

Due to Puerto Rico’s fiscal crisis, its government enacted various tax incentive packages to attract foreign investors and companies. As a foreign jurisdiction for United States tax purposes, the island offers unique incentives unavailable elsewhere within the United States. These incentives allow individuals and companies to claim significant tax exemptions that are considerably more attractive than many United States jurisdictions.

##### 1. *Act 73/2008 (Industrial Incentives)*<sup>38</sup>

Act 73 was enacted to promote industrial development in Puerto Rico. It followed a long line of Puerto Rican legislation aimed at incentivizing foreign companies to establish themselves on the island, including but not limited to, industries in the pharmaceutical, biotechnology, aerospace, and telecommunications sectors.<sup>39</sup> The program provides significant tax incentives to eligible businesses as it provides for a fixed income tax rate of 4-8% and 12% withholding on royalty payments. Pioneer industries<sup>40</sup> are subject to a 1% income tax, and to a 0% rate when the intangible property was developed or created in Puerto Rico.

At the same time, Act 73 grants business entities tax credits<sup>41</sup> for some income tax, such as returns for job creation (\$1,000, \$2,500, or \$5,000, depending on the area), research and development expenses (50%), investment in machinery and equipment for renewable energy usage (up to 50%), purchase of locally manufactured products (25%), and reduction of energy costs for exempt industrial industries (up to 10%). It also offers municipal and property incentives by granting a 90% exemption from personal and property tax, 60% exemption from municipal license tax (75% for qualifying small and medium enterprises), and 100% exemption from state and local sales tax on the purchase of raw materials.

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38. P.R. Laws Ann. tit. 13, § 10641 (2017).

39. *Id.*

40. Pioneer industries are defined as those conducting economic activity not being produced nor done in Puerto Rico in the previous 12 months. P.R. Laws Ann. tit. 13, § 10643(a)(3) (2017).

41. There is a minimum combined tax for these credits of 3% if at least 50% of exempt shareholders are residents of PR and 1% for small and medium enterprises (SME).

## 2. *Act 20/2012 (Services Exportation Incentives)*<sup>42</sup>

Act 20 was enacted to attract investors to move or create companies in Puerto Rico. It establishes financial incentives to create jobs on the island. Through this law, qualifying companies can obtain a tax decree that grants them benefits such as a fixed 4% corporate tax or fixed income tax rate; 100% tax exemption on qualifying dividends or benefits for shareholders; 60% exemption on municipal tax; and, a 100% exemption on property tax for the first five years of operation and 90% thereafter. Act 20 stipulates that to maintain the tax decree the company must create at least five jobs within the first two years of operation, and open a local bank account. To benefit from Act 20's incentives, the company must render services from within Puerto Rico and export its services to foreign jurisdictions. Defined most favorably for the investor, foreign jurisdictions include other United States jurisdictions.

## 3. *Act 22/2012 (Individual Investors)*<sup>43</sup>

Act 22, on the other hand, was enacted to attract individual investors. These investors might be owners of Act 20 companies, creating a very beneficial type of tax incentive synergy. Act 22 investors must establish themselves in Puerto Rico and become *bona fide* residents of the island. To qualify, they must not have been residents of Puerto Rico in the six years prior to January 2012. Moreover, they must purchase real property on the island during the first two years of residence and open a local bank account. Once the investment is made, these investors enjoy a 100% tax exemption on Puerto Rico-sourced interest and dividends, 100% tax exemption on income taxes (short term), and on long term capital gains accrued (once established).

## 4. *Act 273/2012 (International Financial Intermediaries)*<sup>44</sup>

Under the same line of exporting services, Act 273 was enacted to deal directly with international financial entities (IFE) managing foreign investment in Puerto Rico. The IFE may participate in and accept deposits from foreign persons; accept collateralized deposits; borrow duly secured money; engage in foreign currency exchange; invest in securities, stock, notes, and bonds of the PR government; negotiate or refinance letters of credit in transactions for the financing of exports; and trade securities outside of Puerto Rico on behalf of foreign persons, among others. The IFE is, however, prohibited from engaging in transactions with domestic persons or from issuing loans or letters of credit to be used in Puerto Rico.

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42. P.R. Laws Ann. tit. 13, § 10831 (2017).

43. P.R. Laws Ann. tit. 13, § 10851 (2017).

44. P.R. Laws Ann. tit. 7, § 3081 (2017).

There are very specific requirements and processes to follow in order to obtain the license and tax decree,<sup>45</sup> including significant investment and local job creation. However, once approved and established, the IFE benefits from various tax exemptions. Among these, it will only be subject to a 4% fixed income tax rate; a 6% rate for income tax on dividends for shareholders or partners of the IFE that are residents of PR; a 100% exemption on payments of municipal license taxes; a 100% tax exemption on all real and personal property belonging to the IFE; and, a 100% exclusion from interest, financing charges or participation in partnership benefits.

### 5. *Act 185/2014 (Private Equity Funds)*<sup>46</sup>

As the last example of investment incentives in Puerto Rico, Act 185 was enacted to grant special tax treatment to private equity (PE) funds. The law is aimed at allowing private investors tax benefits as if they were providing a direct investment.<sup>47</sup> The qualifying PE funds must be engaged in buying and selling securities that are not offered on public stock exchange markets, either in the United States or another country. Act 185 also requires the private equity fund to 1) have a local office in Puerto Rico; 2) invest a minimum of 80% of the paid-in capital in securities issued by entities that are not available in the public stock exchange market when acquired; 3) invest the remaining paid-in capital in direct United States or Puerto Rico—or United States or Puerto Rico guaranteed—short term obligations; 4) only admit accredited investors; 5) use a registered investment adviser with a business in Puerto Rico; 6) operate a diversified investment fund; 7) have a minimum capitalization of \$10 million; 8) appoint at least one of the investors or limited partners to an advisory board; and 9) in the case of a foreign partnership or foreign LLC, it must derive at least 80% of gross income from Puerto Rico or sources connected to Puerto Rico. Once eligible, the funds will pay a 10% fixed income tax, receive a tax exemption for capital gains, and a 5% fixed income tax for sale of property interest for investors, among other benefits. The funds are also exempt from state and municipal property tax and income taxes.

As noted above, most of these tax incentives have been available for some time. Nevertheless, due to the current economic crisis, the government is promoting them on a greater scale than ever before. This, in turn, has led to an increase in foreign investment entering the island. Promotion has also caused the creation of new visas to accommodate foreign investors.

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45. Some of these include: submitting a business plan, capital investment evidence, shareholders' information, and a non-refundable application fee. The IFE must first be approved before it can incorporate in the P.R. State Department.

46. P.R. Laws Ann. tit. 7, § 3111 (2017).

47. P.R. Laws Ann. tit. 7, § 3111, Preamble (2014).

## B. FOREIGN INVESTOR VISAS FOR INVESTING IN PUERTO RICO

As a United States territory, any foreign investor that enters Puerto Rico must have a valid United States visa for investment purposes. Below is an explanation of the available foreign investment visas.

### 1. *Foreign Investor Visas*

#### a. E-2 Visa

Citizens of countries that have commerce treaties with the United States may invest and immigrate to the United States by means of an E-2 visa.<sup>48</sup> The foreign national must make a significant investment in a *bona fide* business enterprise and seek to enter the United States to direct and develop that enterprise. Under this visa, the investor will be granted an initial two-year stay, which may be extended for another two years. It should be noted that the investment required by this program should be sufficient for the maintenance of the business in question. Puerto Rico provides sufficient economic incentives to enable investors with limited means to add more value to their investments.

#### b. EB-5 Visa

EB-5 was created to stimulate the United States economy and generate jobs. The program allows foreign investors to inject capital in the United States to establish commercial enterprises, in either a new business or an existing troubled business.<sup>49</sup> Normally the investment must be of at least \$1 million.<sup>50</sup> However, if the new commercial enterprise is in a “targeted employment area,”<sup>51</sup> such as Puerto Rico, the required investment amount is a reduced to \$500,000.<sup>52</sup> This is a significant point a potential investor must consider when deciding where to settle. Many Puerto Rican businesses have suffered economically because of the island’s current fiscal situation. Additionally, the island’s unemployment rate is very high due to the ongoing economic recession. According to the Bureau of Labor Statistics, the unemployment rate on the island is 12.1%.<sup>53</sup>

48. 8 C.F.R. § 214.2(e)(12) (2016).

49. 8 C.F.R. §§ 204.6 and 216.6 (LEXIS through the March 27, 2017 issue of the Fed. Reg.); USCIS, POLICY MEMORANDUM, PM-602-0083, EB-5 ADJUDICATIONS POLICY (2013).

50. 8 U.S.C.S. § 1153(b)(5)(C)(i) (LEXIS through Pub. L. No. 115-14).

51. A targeted employment area is an area that, “at the time of the investment, [is] a rural area or an area which has experienced high unemployment (of at least 150 percent of the national average rate)” and rural area as “any area other than an area within a metropolitan statistical area or within the outer boundary of any city or town having a population of 20,000 or more (based on the most recent decennial census of the United States).” 8 U.S.C.S. § 1153(b)(5)(B)(ii),(iii); *see also* 8 C.F.R. § 204.6(e) (LEXIS through the March 27, 2017 issue of the Fed. Reg.).

52. 8 U.S.C.S. § 1153(b)(5)(C)(ii); 8 C.F.R. § 204.6(f)(2).

53. *Puerto Rico*, U.S. BUREAU OF LABOR STATISTICS, [http://www.bls.gov/regions/new-york-new-jersey/puerto\\_rico.htm#eag\\_pr.f.2](http://www.bls.gov/regions/new-york-new-jersey/puerto_rico.htm#eag_pr.f.2) (last visited April 10, 2017) (Data from October 2016); The data published on November 9, 2016, showed the U.S. unemployment rate at 4.6%. Press

These conditions have been accompanied by a trend of increasing unemployment over the last several months. When broken down into municipalities, all rural areas, and most urban areas, qualify as “targeted employment areas.” This means that a potential investor can establish a new business or help a troubled one almost anywhere on the island, and enjoy the immigration benefits and tax incentives discussed above. The new business must create at least ten full-time jobs within two years.<sup>54</sup> Note that this threshold is higher than that required by any of the tax incentives in Puerto Rico. Therefore, the local job requirement criteria would be met for visa purposes. Puerto Rico has regional centers that can assist with meeting the job creation requirements.<sup>55</sup>

### c. International Entrepreneur Rule

The enactment of a rule concerning international entrepreneurship is a significant recent change in United States immigration law.<sup>56</sup> On August 29, 2016, United States Citizenship and Immigration Services proposed an amendment to its discretionary parole that favors international entrepreneurs.<sup>57</sup> The rule would allow entrepreneurs entry to the United States to create start-up entities providing “significant public benefits,” evaluated on a case-by-case basis. The applicants must show significant ownership interest in a startup formed in the last three years, and demonstrate rapid business growth and job creation. The latter is shown by significant investments of capital or evidence of substantial potential to do so. Once granted, the entrepreneurs will be allowed to stay in the United States to develop and grow their entities. Qualifying entrepreneurs will be granted an initial two-year stay, with a possible extension of three additional years.

When the proposed rule was released, it appeared to target potential Silicon Valley beneficiaries.<sup>58</sup> However, Puerto Rico tax incentives might be more appealing to some entrepreneurs. If adopted, it might offer an easier,

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Release, THE EMPLOYMENT SITUATION — FEBRUARY 2017, U.S. Bureau of Labor Statistics Tbl.A-1 (Mar. 10, 2017), *available at* <http://www.bls.gov/news.release/pdf/empstat.pdf>.

54. Note that P.R. labor and employment laws require employers to offer additional employee benefits and protections that are not required in other U.S. jurisdictions.

55. *Immigrant Investor Regional Centers*, USCIS (Apr. 10, 2017), <https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-cb-5/immigrant-investor-regional-centers>.

56. 8 CFR §§ 103, 212 and 274a; *See Obama Administration Announces New Steps to Welcome International Entrepreneurs*, U.S. DEPARTMENT OF HOMELAND SECURITY (Aug. 26, 2016), <https://www.dhs.gov/blog/2016/08/26/obama-administration-announces-new-steps-welcome-international-entrepreneurs>.

57. Press Release, USCIS Proposes Rule to Welcome International Entrepreneurs, USCIS (Aug. 26, 2016), <https://www.uscis.gov/news/news-releases/uscis-proposes-rule-to-welcome-international-entrepreneurs>.

58. Stacey Cowley, *U.S. Immigration Option Could Aid Entrepreneurs*, THE N.Y. TIMES B2 (Aug. 27, 2016), *available at* <http://www.nytimes.com/2016/08/27/business/entrepreneur-immigration.html>.

and more beneficial, economic pathway for the development of the companies in question and for the investor to meet the required level of job creation. The proposed rule is still pending final publication before its entry into force.

## 2. *Foreign Company Investment Visas*

### a. L Visas

Companies wishing to open a new branch, subsidiary, or affiliate—in sum a “qualifying organization”—can do so by means of an L-1 visa for its employees, for intracompany business transfers.<sup>59</sup> These companies can take advantage of Puerto Rican economic incentives to establish their business on the island. Of course, there is a need for job creation for the local population. However, the companies can ensure their staff can enter the United States to establish the business and train new employees to get the enterprise up and running.<sup>60</sup> By meeting the Puerto Rican requirements for tax incentives, they will most likely be meeting the same for the new business establishment. Additionally, these visas allow the foreign worker to bring their family along.<sup>61</sup>

## C. TAKING ADVANTAGE OF INVESTMENT OPPORTUNITIES IN PUERTO RICO

Puerto Rico’s economic situation and its many economic incentives create the perfect climate for attracting foreign investors seeking to enter the U.S. market. Although many of these incentives have been available for some time, the current economic climate has led many foreign investors to look toward the island as an alternative for relocating to the United States. At the same time, with the current exodus of residents from the island, the opportunities to invest in job creation, in businesses in peril, and in real estate at reduced prices, have increased significantly in the last year. As discussed above, its economic climate facilitates the investment opportunities as it can ensure a better revenue for investors.

Puerto Rico is also a distinct U.S. jurisdiction to invest in, as its cultural and geographical characteristics give it a unique advantage. Puerto Rico is a Spanish speaking—though also English speaking<sup>62</sup>—Latin American country in the middle of the Caribbean. As such, it provides the perfect gateway for penetrating Latin American markets. Its people will not have any significant cultural or language barriers when conducting business in Latin America. Therefore, it provides the ideal conditions for creating businesses in the

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59. 8 C.F.R. § 214.2(l)(3)(v) (2016); see also *L-1A Intracompany Transferee Executive or Manager*, USCIS (June 17, 2016), <https://www.uscis.gov/working-united-states/temporary-workers/l-1a-intracompany-transferee-executive-or-manager>.

60. 8 C.F.R. § 214.2(l)(1)(ii).

61. *Id.*

62. Given its historical and political characteristics, Spanish and English are both official languages on the island.

United States that intend to negotiate with markets in Latin America, while also providing the bilingual and culturally adapted employees to do so.

## V. Refugees in Europe and the EU-Turkey Statement: Problems and Prospects<sup>63</sup>

The current border crisis in Europe poses a challenge for European States serious about responding to the inflow of refugees and migrants in a compassionate and humane manner. The Syrian civil war, unrest across the Middle East, and instability and repression in African countries such as Mali and Eritrea triggered the arrival of 280,000 people at Europe's shores in 2014, and over one million individuals in 2015.<sup>64</sup> The asylum reception and determination systems of Greece and Italy have been cracking under the number of people arriving spontaneously from Turkey and Northern Africa. In 2015, a photograph of Alan Kurdi, a Syrian toddler who drowned while trying to reach Europe from Turkey in a dinghy, sparked a wave of seeming compassion across Europe. Citizens took to the streets to declare "Refugees Welcome," and demanded that governments do more to help refugees.<sup>65</sup> Less than a year later, however, popular opinion appeared to turn. In the United Kingdom, immigration formed a central part of the "leave" campaign's message to Brexit voters.<sup>66</sup> The people of Hungary voted on a referendum proposing the rejection of the European Union's ("EU") system of migrant quotas.<sup>67</sup> Throughout Europe, far-right anti-immigration politicians enjoyed a surge in popularity.<sup>68</sup>

Against this backdrop, in March 2016, the EU negotiated an agreement with Turkey whereby "irregular migrants" arriving in Greece from Turkey will be returned to Turkey. The EU-Turkey Statement raises serious questions of refugee and human rights law because of deficiencies in the Greek and Turkish asylum systems, and question concerning whether Turkey is a "safe country" for asylum seekers and refugees.<sup>69</sup>

63. Clíodhna Murphy, Lecturer, Department of Law, Maynooth University; Former postdoctoral fellow, University College Cork; PhD (2012), MLitt (2006), LLB (2004), Trinity College Dublin.

64. *Global Trends: Forced Displacement in 2015*, UNHCR 13-17 (June 20, 2016), available at <http://www.unhcr.org/statistics>.

65. Mukul Devichand, *Alan Kurdi: Has One Picture Shifted Our View of Refugees?* BBC (Sept. 3, 2015), <http://www.bbc.com/news/blogs-trending-34142804>.

66. Alan Travis, *Fear of immigration drove the leave victory – not immigration itself*, THE GUARDIAN (June 24, 2016, 12:23 BST), <https://www.theguardian.com/politics/2016/jun/24/voting-details-show-immigration-fears-were-paradoxical-but-decisive>.

67. May Bulman, *Hungary referendum against EU migrant quotas fails due to low turnout*, THE INDEPENDENT (Oct. 2, 2016 20:37 BST), <http://www.independent.co.uk/news/world/europe/hungary-referendum-eu-migrant-quotas-fails-low-turnout-a7342071.html>.

68. See e.g., *Europe's Rising Far Right: A Guide to the Most Prominent Parties*, N.Y. TIMES (Nov. 17 2016), [http://www.nytimes.com/interactive/2016/world/europe/europe-far-right-political-parties-listy.html?\\_r=0](http://www.nytimes.com/interactive/2016/world/europe/europe-far-right-political-parties-listy.html?_r=0).

69. There have been many useful blog contributions to this debate. James Hathaway, *Three legal requirements for the EU-Turkey deal: An interview with JAMES HATHAWAY*,

### A. WHAT IS THE EU-TURKEY STATEMENT?

The EU-Turkey Statement, agreed to by representatives of the European Council and Turkey, was announced on March 18, 2016.<sup>70</sup> The status of the Statement is somewhat ambiguous; it is not a treaty, and is therefore not subject to challenge or approval in the same manner as a treaty.<sup>71</sup> The centerpiece of the Statement is the commitment that, “[a]ll new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey.”<sup>72</sup> In an effort to render this remarkable sweeping statement compatible with human rights and refugee law, it is immediately clarified that “[t]his will take place in full accordance with EU and international law, thus excluding any kind of collective expulsion.”<sup>73</sup>

Second, for every Syrian returned to Turkey from the Greek islands, another Syrian will be resettled from Turkey to the EU.<sup>74</sup> Furthermore, when the numbers of those arriving have reduced significantly, the EU will establish a Voluntary Humanitarian Admission Scheme.<sup>75</sup> The EU also agrees to pursue visa liberalization for Turkish citizens,<sup>76</sup> to re-energize the Turkish accession process,<sup>77</sup> and to provide funds for the reception of refugees in Turkey.<sup>78</sup> In addition, the EU and Turkey agree to work towards developing a safe zone in Syria, and Turkey undertakes to try to prevent the opening of new smuggling routes.<sup>79</sup>

The part of the deal causing the most controversy is the approach to asylum claims.<sup>80</sup> Anyone who arrives in Greece may apply for asylum, with the accompanying procedural guarantees, including: individual interviews, individual assessments, and rights of appeal. Applications can be rejected, and the individual returned to Turkey, if the application is deemed to be

VERFASSUNGSBLOG (Mar. 9, 2016), <http://verfassungsblog.de/three-legal-requirements-for-the-eu-turkey-deal-an-interview-with-james-hathaway/>; Daniel Thym, *Why the EU-Turkey Deal is Legal and a Step in the Right Direction*, VERFASSUNGSBLOG (Mar. 9, 2016), <http://verfassungsblog.de/why-the-eu-turkey-deal-is-legal-and-a-step-in-the-right-direction/>; Kay Hailbronner, *Legal Requirements for the EU-Turkey Refugee Agreement: A Reply to J. Hathaway*, VERFASSUNGSBLOG (Mar. 11, 2016), <http://verfassungsblog.de/legal-requirements-for-the-eu-turkey-refugee-agreement-a-reply-to-j-hathaway/>.

70. European Council Press Release 144/16, Foreign Affairs and Int’l Rel., EU-Turkey statement 1, 1 (Mar. 18, 2016).

71. Maarten den Heijer & Thomas Spijkerboer, *Is the EU-Turkey refugee and migration deal a treaty?*, EU LAW ANALYSIS BLOG (Apr. 7, 2016), <http://eulawanalysis.blogspot.ie/2016/04/is-eu-turkey-refugee-and-migration-deal.html?m=1>.

72. EU-Turkey statement, *supra* note 68, at 2(1).

73. *Id.*

74. EU-Turkey statement, *supra* note 68, at 2(2).

75. European Council Press Release 144/16, Foreign Affairs and Int’l Rel., EU-Turkey statement 1, 2(4) (Mar. 18, 2016).

76. *Id.* at 2(5).

77. *Id.* at 3(7).

78. *Id.* at 2(6).

79. *Id.* at 2(3).

80. See European Commission MEMO/16/963, EU-Turkey Statement: Questions and Answers (Mar. 19, 2016).

unfounded on the merits or the applicant is found to be inadmissible (*i.e.*, the application is rejected after a fast-track procedure without examination of the substance). Applicants could be deemed inadmissible because Turkey was a first country of asylum, or it is a “safe third country.” The EU’s endorsement of Turkey as a safe third country is most problematic. Turkey refused to adopt the 1967 Protocol to the 1951 Refugee Convention, meaning that it is not legally bound by the 1951 Convention for non-European refugees.

## B. HUMAN RIGHTS AND REFUGEE LAW CONCERNS: IS THE DEAL LEGAL?

The key legal criticism of the EU-Turkey Statement is that returning “all” irregular migrants to Turkey, potentially without a full individualized assessment of asylum and human rights claims for protection, could violate the European Convention on Human Rights’ (“ECHR”) prohibition on collective expulsions (Art. 4 of Protocol 4). In its seminal decisions in *Hirsi Jamaa v Italy*<sup>81</sup> and *Khlaifa v Italy*,<sup>82</sup> the European Court of Human Rights confirmed that collective procedures for expulsion not including the opportunity for individual assessment are contrary to the ECHR. These concerns inspired the reassurances in the first paragraph of the Statement that there will not be “any kind of collective expulsion.” Thus far, it appears that most people arriving in Greece have had an effective opportunity to make an asylum claim and have their case considered on the merits.

The conditions faced by asylum seekers and refugees in both Greece and Turkey also raise serious human rights issues, and may be incompatible with the ECHR and the EU Charter of Fundamental Rights (“CFR”). In *MSS v Belgium and Greece*,<sup>83</sup> the European Court of Human Rights found that the Greek reception and determination system was systemically deficient, leading to inhuman and degrading treatment in contravention of Article 3 of the ECHR. In November 2016, the EU Fundamental Rights Agency’s observation team reported that in Kos, new arrivals are without any shelter. The team also found that, on some of the smaller islands, no reception facilities exist, and people sleep outside or in private rental accommodation.<sup>84</sup> In addition, a report produced for the Council of Europe noted that the Greek asylum system lacks the capacity to effectively process these asylum applications, raising procedural concerns (including those relating to legal representation through the asylum process) and the possibility of errors.<sup>85</sup> With respect to Turkey, non-governmental

81. *Jamaa v. Italy*, App. No. 27765/09 14,19 (2012).

82. *Khlaifa v. Italy*, App. No. 16483/12 (2015).

83. *M.S.S. v. Belgium*, App. No. 30696/09 75-6 (2011).

84. EU Fundamental Rights Agency, Weekly data collection on the situation of persons in need of international protection, Update 8, 26 (2015), available at [http://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2015-weekly-compilation-8\\_en.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/fra-2015-weekly-compilation-8_en.pdf).

85. Eur. Consult. Ass., *The situation of refugees and migrants under the EU-Turkey Agreement of 18 March 2016*, 2d Part Session (18-22 April 2016), Doc. No. 14028 (2016), available at <http://>

organizations report on refugees' fear of being returned to Turkey, and document instances of violence by Turkish police and border guards.<sup>86</sup> If an individual can demonstrate a real risk of suffering torture, or inhuman or degrading treatment or punishment in Turkey, return would be contrary to the ECHR and the CFR.

Finally, the arrangements made by the deal may conflict with other EU law measures. Under the Dublin Regulation, asylum seekers with valid and verified family connections in another Member State must be transferred to the appropriate EU Member State to complete asylum procedures, rather than be returned to Turkey.<sup>87</sup> UNHCR reports that many current arrivals are seeking to join family members in Europe; therefore, this could form a fruitful avenue of challenge in the appropriate case.

### C. CONCLUDING REMARKS: THE QUESTIONABLE ETHICS OF EU ASYLUM POLICY

The legality of the EU-Turkey deal is questionable from several angles, and will certainly be tested. Cases relating to aspects of the deal are pending at the Court of Justice of the EU<sup>88</sup> and in Ireland.<sup>89</sup> At the level of principle, the Statement itself appears to stay (just) within the confines of international and EU law, meaning that much depends on its implementation in practice. The outcomes of individual challenges will most likely depend on the facts of those cases. As mentioned above, decision-makers in Greece seem to have, thus far, tried to adhere to EU and international standards. The number of people returned has been quite low to date and mainly include those who have not made an asylum claim.

Quite aside from the legal challenges, the EU-Turkey Statement is undoubtedly a further step in the politics of *non-entrée* already pursued in Europe through the imposition of strict visa requirements, carrier sanctions,

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assembly.coe.int/nw/Home-EN.asp (click "search"; then "official documents" and search for Doc. No. 14028).

86. See, e.g., *Greece: Refugees detained in dire conditions amid rush to implement EU-Turkey deal*, AMNESTY INTERNATIONAL (Apr. 7, 2016), <https://www.amnesty.org/en/latest/news/2016/04/greece-refugees-detained-in-dire-conditions-amid-rush-to-implement-eu-turkey-deal/>.

87. Commission Regulation 604/2013, of the European Parliament and of the Council of 26 June 2013, establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, 2013 O.J. (L 180) 31,32 (EU).

88. Case T-192/16, *NF v. Council*, 2017 E.C.R.; Case T-193/16, *NG v. Council*, 2017 E.C.R.; Case T-257/16, *NM v. Council*, 2017 E.C.R.; INFORMATION NOTE: Cases before the General Court of the European Union, 2016 O.J. C 9897/16, *available at* <http://www.statewatch.org/news/2016/jun/eu-council-turkey-agreement-challenges-9897-16.pdf>.

89. Mary Carolan, *Syrian families held in Greece sue Ireland, EU over rights Breaches*, IRISH TIMES (Nov. 7, 2016), <http://www.irishtimes.com/news/crime-and-law/courts/high-court/syrian-families-held-in-greece-sue-ireland-eu-over-rights-breaches-1.2857833>.

and the closure of the land border between Greece and Turkey.<sup>90</sup> Above all, the deal is clearly intended to be a message that “Europe is closed.” This approach is especially disappointing when one views the numbers in global context. Europe hosts 6% of the world’s refugees, “compared with 39% in the Middle East and North Africa, and 29% in the rest of Africa.”<sup>91</sup> In addition, the ‘one-for-one’ swap of so-called irregular migrants for resettled refugees sits uneasily with the value of human dignity and a real commitment to international protection. Moreover, the general state of human rights in Turkey (for example, in relation to freedom of expression), while not directly legally relevant to the question of whether Turkey is safe for refugees, is of concern to observers in Europe. Conditions in Turkey raise the issue of whether the re-energizing of the Turkish accession process would be legitimate or appropriate.

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90. See generally Kelly M. Greenhill, *Open Arms behind Barred Doors: Fear, Hypocrisy and Policy Schizophrenia in the European Migration Crisis*, 22 EUR. L.J. 317, 317–332 (2016) (For academic commentary).

91. *Correcting media myths about refugees and migrants*, UNESCO (Jan. 7, 2016), available at [http://www.unesco.org/new/en/media-services/single-view/news/correcting\\_media\\_myths\\_about\\_refugees\\_and\\_migrants/](http://www.unesco.org/new/en/media-services/single-view/news/correcting_media_myths_about_refugees_and_migrants/).